Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

ARTHUR G. LAWRENCE and LORRAINE HOWELL
PETITIONERS

VS.

MELISSA ("COLUMBIA"), ET AL.
RESPONDENTS

(SEE LIST OF PARTIES)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE COURT OF APPEALS OF THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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61 pp

QUESTION PRESENTED

Could a Rule 56 (FRCP) Summary Judgment be granted against Petitioners, master lessee and sublessor, in the face of conflicting evidence, when Petitioners' evidence shows that they acted commercially reasonable in refusing to consent to an assignment of their sublease from Petitioners' subtenant to Petitioners' landlord because as a result of the assignment, Petitioners' economic benefits under their leasehold ranging from $1.75 million to $2.0 million would be (and were as a result of the Summary Judgments) squeezed out and transferred from Petitioners to both the subtenant and the landlord?

Respondents [landlord and subtenant] presented evidence, the declaration under oath of the subtenant's counsel who negotiated the agreement for Respondent Oshman, that Petitioners signed their claim to their economic benefits over to the Respondent subtenant in a short agreement [the December, 1988 "Use" Agreement] permitting the subtenant to do whatsoever it wished with the sublease.

On the contrary, the purpose and intent of the agreement was to respond to a threat of forfeiture from the landlord, Respondent Columbia/Ogilvie, of Petitioners' leasehold and Respondent Oshman's sublease because Oshman vacated the premises, this according to the declarations under oath of Petitioners and their former transactional counsel who negotiated the agreement on their behalf.

LIST OF PARTIES

MELISSA HOLDING, INC., (erroneously identified as Development Partners, Inc., formerly known as Wilshire Masterpiece, Inc., formerly known as Wilshire-Canon, Inc., formerly known as 338 Rodeo Corporation), a California corporation; and LIBERTY SERVICE CORPORATION, a California corporation,

Plaintiffs,

v.

JPL PROPERTIES, a purported California general partnership; LORRAINE HOWELL, an individual; ARTHUR G. LAWRENCE, an individual; DR. KARL H. STURCKOW, an individual,

Defendants.

JPL PROPERTIES, a California general partnership; ARTHUR G. LAWRENCE; LORRAINE HOWELL; and KARL H. STURCKOW,

Cross-Complainants-
Appeallants,

FEDERAL DEPOSIT INSURANCE CORPORATION (formerly known as Resolution Trust Corporation), as Receiver for columbia Savings and Loan
Associaton, 338 Rodeo Corporation, Wilshire-Canon, Inc.,

Cross-Defendants.

and

SCOTT V. OGILVIE, THOMAS HARRISON AND OSHMAN SPORTING GOODS,

Cross-Defendants-Appellees

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JURISDICTION

The Ninth Circuit Court of Appeals decided this case on March 14, 1996. A timely petition for rehearing was denied by on May 22, 1996, and a copy of the order denying rehearing appears at Appendix A.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves Rule 56 of the Federal Rules of Civil Procedure, the Summary Judgment rule.

STATEMENT OF THE CASE AND REASONS FOR GRANTING THE WRIT

This case illustrates the importance for the Supreme Court to once again shine its bright light on RULE 56 of the Federal Rules of Civil Procedure. In its unpublished opinion the 9th Circuit Court of Appeals has affirmed two Summary Judgment Orders granted by the United States District Court, Central District of California. The 9th Circuit denied Petitioner's Petition for Rehearing on May 22, 1996. Petitioners also request that the Court take judicial notice of the Attorney Fee Judgment in favor of Respondents and against Petitioners pursuant to the attorney fee clause in the lease and sublease in total amounts exceeding one million dollars ($1,000,000). The Attorney Fee issue was litigated separately and subsequent to the judgment in the case.

Petitioners present the Statement of the Case and the Argument in the first portion of this Petition and the Statement of Facts in the last portion to avoid repetition.

The Petitioners, ARTHUR G. LAWRENCE and LORRAINE HOWELL are the remaining partners of JPL Properties, a defendant and Cross-

Complaint herein. This action was filed in the California Superior Court [1 ER 1]. Petitioners filed a Cross-Complaint against Respondents Columbia and its subsidiaries and also named Ogilvie, Harrison and Oshman as Cross-Defendants. Petitioners demanded a Jury Trial. [1 ER 2 and 3]. The case was removed to the District Court by the Resolution Trust Corporation when it became the Conservator of Petitioners' Landlord. Subsequently, Respondent Oshman had the case transferred to Judge Richard A. Gadbois, Jr., the same judge who ruled on the prior litigation between Petitioners and Oshman. This occurred after Respondent Columbia took over the sublease premises pursuant to the un-consented to assignment and locked out Petitioners, attempting to take over Petitioners' economic interest in the sublease, (see Statement of Facts, infra) to which it succeeded with the help of the District court and the 9th Circuit.

In affirming the District Court's Summary Judgment Orders in favor of all the respondents herein [Columbia Savings and its subsidiaries is hereinafter referred to as "Columbia" and Messrs. Ogilvie and Harrison are hereinafter referred to as "Ogilvie"), Columbia, Ogilvie and Oshman, the 9th Circuit panel has deprived Petitioners of their Constitutional right to a trial to determine glaring and "genuine issues of material fact," which were placed into controversy not only by the parties' declarations, but also by Declarations under oath of the two lawyers who negotiated an Agreement which became central to the case. The issues are "genuine" because a reasonable jury could readily find for the Petitioners under the facts presented (see Statement of Facts, infra), and since the facts affect the outcome of the case, they are also material to the case. This is

shown by the Petitioners' total loss of their economic benefits in their leasehold as a result of the Summary Judgments and the fact that Petitioners are left with an attorney fee judgment against them and in favor of Respondents exceeding one million dollars ($1,000,000).

The United States Supreme Court must intercede in this matter to protect the rights of business litigants to have access to a forum for their rights to be fairly adjudicated where live testimony can be subjected to cross-examination when issues are genuine and facts are material. This case was removed to the United States District Court by the Resolution Trust Corporation and these Petitioners were thereby required to litigate in the federal court on state substantive law issues. Notwithstanding the fact that this case did not come to the federal court pursuant to a federal question, nor a diversity action, the District Judge is not empowered to abuse Rule 56 and hand out Summary Judgments stripping Petitioners of their economic interests in their contracts when evidence is presented by which a jury could readily find in favor of Petitioners with or without cross-examination of Respondents' witnesses.

The first Summary Judgment Order was a ruling that Petitioner's act of refusing to consent to the assignment of the Sublease was "unreasonable." The court adopted Respondent subtenant Oshman's interpretation of the December, 1988, Use Agreement ignoring Petitioners' understanding of the intent and purpose of the Agreement as declared by Petitioners and by Petitioners' former transactional lawyer, Mitchell Ezer, who negotiated the Agreement. The Second Summary Judgment Order ruled that since the Petitioners' act of refusing to consent to

the assignment of the Sublease was "unreasonable," most of the other issues fell, as well, so that all that was left of the case was an action for accounting, and legal fees [pursuant to the legal fee provision in the lease and sublease].

These Summary Judgment Orders were granted and affirmed in direct violation of Rule 56 as interpreted by this court in Anderson v. Liberty Lobby, Inc., 477 US 242, 248, 106 S.Ct. 2505, 2510 (1986), in which this Court stated that a dispute is "genuine" if "the evidence is such that a reasonable jury might return a verdict for the nonmoving party." The Court further stated that it is the court's role to decide if, based on material facts presented, or inferences which could be drawn therefrom, a reasonable jury might rule for the nonmoving party; it is not the role of the court to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue of fact." Id., at 249.

The heart of this case involves a dispute among business parties relating to two major issues:

1) whether an act of Petitioners was "reasonable" in refusing to consent to an assignment of their Sublease from the subtenant to the landlord which would transfer Petitioner's economic benefits in the sublease to which only the Petitioners were entitled under the master and sublease of upwards of $1,750,000, to both its Master Landlord and its Subtenant, substantially enhancing the interests of those parties who were specifically not entitled to the enhanced value under the Master Lease and Sublease Agreements, and

2) whether an Agreement entered into between Petitioner and its Subtenant in 1988, modifying the Subtenant's "use" of the

premises ("The December, 1988 Use Agreement") [1 ER 13, Ex. H], had the intent and purpose to waive the subtenant's prior breaches of the sublease and to serve as an interim agreement permitting the subtenant to "use" the premises for other than retail purposes to temporarily respond to the landlord's threat of forfeiture of the leasehold because the subtenant vacated the premises. This was declared under oath by the Petitioners and their former transactional lawyer who negotiated the agreement. Or whether the intent and purpose of the agreement was to serve as a vehicle by which Petitioners' gave to the subtenant any claim to the economic benefits under the sublease as declared under oath by the transactional lawyer for the subtenant. The December Use Agreement is susceptible to Petitioners' interpretation under California law, therefore subjecting the determination of the intent of the parties to the finder of fact. Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co., Inc., 69 C.2d 33.

At the heart of the controversy in the instant case were two Declarations by the two lawyers who negotiated the December, 1988, Use Agreement each on opposite sides, each declaring under oath that The Use Agreement had a different intent and objective.

On the Petitioners' side, the lawyer, Mitchell Ezer, declared that The Use Agreement was a document by which Petitioners waived prior breaches of the Subtenant and permitted the Subtenant to use the premises for any purpose it wished as an interim solution to the threat caused by the petitioners' landlord which had served notices upon the subtenant intending to declare a forfeiture of the leasehold

because the subtenant had vacated the premises and therefore the "dark clause" [not permitting the premises to be vacant] was breached. [6 ER 35 and 37]. This threat by the landlord had come as a surprise to Petitioners becaupe this conduct was contrary to the landlord's previous acts in negotiating with Petitioners to acquire the leasehold free of the encumbrance of the sublease.

On the Subtenant's side [Respondent Oshman] their lawyer, Ralph Zarefsky, declared under oath that none of what the Petitioners' lawyer declared was true but that the December, 1988, Use Agreement was intended to and did permit the Subtenant to do whatever it wanted with the Sublease, not just the use of the premises. [6 ER 36]. The subtenant was apparently inferring that this meant that the subtenant could convey the sublease to the landlord, Respondents Columbia and Ogilvie, to help the landlord squeeze out the Petitioners' economic interests and get something for itself, to which it was not entitled under the sublease.

If one were to accept the subtenant's [Respondent Oshman] position, this would also imply that under the December, 1988, Use Agreement, the subtenant could dump the sublease on the market for the low minimum rent it was paying and attempt to get something for itself by designating money received as "move-out" money [if the subtenant had moved out 6 months earlier] and/or "leasehold improvement" money which is exactly what it did under the assignment [7 ER 49, Ex. 56]. However, this act did more under this assignment, it enabled the landlord to garner the balance of Petitioners' economic benefits under the master lease without paying for them which

is what the landlord had been attempting to do in order to demolish the building (see the Statement of Facts, infra. Not only did this act by the subtenant violate paragraph 13 of the sublease which provides that any increase in rent generated by a sub-sublease or assignment, if approved by the Sublessor [Petitioners], would inure to the Sublessor, but also it violated the implied covenant of good faith and fair dealing which has become part of the lease contracts under California law. [Kendall v. Ernest Pestina, Inc., 40 Cal.3d 488, 220 Cal.Rptr. 818 (1985) (the parties to a lease should not "do anything which will have effect of destroying or injuring either party's [here Petitioners'] right to receive the fruits of the contract"] ; Carma Developers (California), Inc., v. Marathon Development California, Inc., 2 Cal.4th 342.

Although the Declarations by the two lawyers, Ezer [for Petitioners] and Zarefsky [for Respondent Oshman] are at the heart of the controversy and most definitely affect the outcome of this case, the District Court refused to permit Petitioners to have a trial in order to cross-examine both of these witnesses in front of a fact-finding jury to determine the truth of the matter. Instead, the District Court decided to adopt the Declaration of the Subtenant's [Respondent Oshman] lawyer and ignore the evidence of the Petitioners' and Petitioners' transactional lawyer, Mitchell Ezer. The Petitioners' lawyer was not the litigation lawyer in the case; however, the Subtenant's lawyer making his Declaration was the litigation lawyer in the case.

Respondents have argued below that in responding to their May 16, 1989, joint request for consent by Respondents to the assignment [1 ER 13, Ex. I], Petitioners

gave only one reason for refusing, i.e., that the new subtenant [landlord Columbia] would not generate a percentage rent through retail sales. [1 ER 13, Ex. J]. However, that was only the first portion of Petitioners' reasons given. After Respondents sent their June 2, 1989, letter [1 ER 13, Ex K] to Petitioners, threatening to go forward without Petitioner's consent, Petitioners sent another letter to Respondents on June 9, 1989 [1 ER 13, Ex L], stating that Petitioners were aware that Respondent Columbia [and Ogilvie] was attempting to "wrest" from Petitioners their leasehold interest without paying for it, that the premises were on the market for market rent. Are these facts not genuine issues which affect the outcome of this litigation to be tried by a jury?

Moreover, with respect to whether Petitioners acted reasonably in refusing to consent to the assignment, Carma, 2 Cal.4th, at 366, states:

> "'Whether the landlord's [here Petitioner sublessor] consent has been unreasonably withheld in a particular case is a question of fact on which the tenant [here Respondent, subtenant Oshman] has the burden of proof. The tenant [here subtenant] may satisfy the burden of proof by showing that, in response to the tenant's written request for a statement of reasons for withholding consent, the landlord has failed, within a reasonable time, to state in writing a reasonable objection to the transfer.'" (quoting Stats. 1989, ch. 982, § 2). [Emphasis added].

Not only did Respondents not carry their burden in the instant case to show that Petitioners were

unreasonable, but also the facts which were placed in controversy to determine Petitioners' reasonableness were genuine issues, not to be determined by a judge pursuant to a Summary Judgment motion, but rather to be determined by a trier of fact which here would have been a jury by Petitioners' demand.

Additionally, the facts which were central to Petitioners' case definitely affected the outcome of the case as is reflected in the results of the Summary Judgments -- Petitioners lost all of their economic benefits to which they were entitled under their leasehold interest, all of which were transferred to Respondent Oshman, approximately $300,000,[1] and a range of $1.45 million to $1.7 million to Respondents Columbia/Ogilvie (See Statement of Facts, infra, referring to Columbia's first offer of 1987, made by Columbia to Petitioners and their subsequent negotiations in the range of $2.0 million). But this is not all, as stated above at page 1. Petitioners are left with a judgment against them for attorney fees in favor of respondents in amounts exceeding one million dollars ($1.0 million). Therefore, the Respondents succeeded by Summary Judgment to garner Petitioners' economic benefits to which they were entitled to under their commercial leasehold interest, and in addition are holding Petitioners responsible under a judgment for attorney fees exceeding

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[1] Oshman actually received approximately $620,000 from Columbia/Ogilvie. [7 ER 56]. However, approximately $320,000 of this sum represented the amount of a judgment which Petitioners' owed to Oshman pursuant to an attorney fee judgment relative to a prior litigation matter (see Statement of Facts, infra). Petitioners later paid that judgment to Columbia when Columbia after purchasing it from Oshman attempted to levy on the leasehold and later on Petitioners' partnership interests in the leasehold.

one million dollars pursuant to the attorney fee clause under the lease and sublease.

Put another way, the attorney fee clause was recognized and honored by Respondents and the Court, but not the clauses which protected Petitioners' economic interests, i.e., paragraph 13 in the sublease which requires any increase in rent to inure to Petitioners on a sublease or assignment [10 ER 1B] and paragraph 31 of the Rider to the master lease which does not permit increase in rent under a sublease or assignment to inure to the landlord [10 ER 1A]. These clauses reflected Petitioners original objective of generating a profit through subleasing when it entered into the master lease in 1971 through their partnership JPL Properties and other previous partners in JPL.

It is of interest to note that the 9th Circuit Court of Appeals in its unpublished opinion did recognize that Petitioners are entitled to any increased rent generated by a sub-sublease or assignment of the sublease under Kendall, 40 Cal.3d at fn 17, however, the court fails to carry out its duty to permit a trier of fact to ascertain what that increased rent would be in the market place and what the value of Petitioners' economic benefits were under the leasehold!

Neither Public Policy nor Federal Rule of Civil Procedure 56 support such blatant violation of the rights of litigants to have "genuine issues of material fact" determined by a finder of fact. In this case, Petitioner demanded a jury trial but was deprived of having any issues whatsoever decided by a jury.

Rule 56 was enacted to avoid trials of those cases in which a jury could not

reasonably find for the nonmoving party on factual determinations that affect the outcome of a case, or if there were no facts to support all the necessary elements of the Plaintiff's complaint. It specifically provides that a judge, when ruling on a Motion for Summary Judgment, is not empowered to decide the truth of the matter, but only whether a reasonable jury might return a verdict for the non-moving party, and if not, a Summary Judgment is mandated. But if a reasonable jury might return a verdict for the non-moving party, then the court must not grant a Summary Judgment.

There is no doubt that the December, 1988, Use Agreement and the interpretation of the intent of the parties thereto was central to the outcome of this case. When the two lawyers who negotiated that agreement each declare under oath that the parties intent, objective and understanding of the Agreement was different, this is a "genuine issue" which must be given to the jury because any reasonable jury could find for either party -- but it is not for the judge to decide which lawyer was telling the truth when ruling on a Summary Judgment motion. A finder of fact is entitled to hear live testimony from both of these lawyers to determine the intent of parties when negotiating The Use Agreement. Petitioners were deprived of their constitutional right to have a jury make the determination of whether Petitioners acted reasonably, what was the intent of the parties in the December, 1988, Use Agreement, and the amount of damages Petitioners' sustained as a result of Respondents' conduct.

STATEMENT OF FACTS

This case arises from a dispute between

Petitioners as the remaining general partners of JPL Properties which through its partnership was the master tenant under a long term lease of choice commercial property in the heart of Beverly Hills, California; its subtenant, Respondent, Oshman's Sporting Goods, California ("Oshman"), Respondent, Columbia Savings & Loan and its Subsidiaries ("Columbia") [now in conservatorship with the FDIC, and Respondents, Scott Ogilvie and Tom Harrison ("Ogilvie"), joint venture partners with Columbia. In 1987, Columbia acquired from Petitioners' former landlord, the fee interest in the underlying fee interest in which the leasehold premises are located.[2]

In 1971, Petitioners ARTHUR G. LAWRENCE, LORRAINE HOWELL and others [Marvin A. Piper, M.D., and Horace C. Jenkins, M.D.] created a general partnership, JPL PROPERTIES. The purpose of this partnership was to acquire a leasehold interest in choice commercial property located on Wilshire Boulevard in Beverly Hills, California, and to sublease the premises for a profit. In order to enhance the premises and generate a profit, when the lease was executed ("master lease") in 1971, a fixed rent was negotiated for the full twenty-five (25) year term of the Master Lease. To induce the fee holder to agree to a fixed rent, Petitioners made available to their original landlord [Starkman] the sum of one hundred thousand dollars ($100,000) to assist him in his acquisition of the underlying fee. The $100,000 was designated a Security Deposit and repayable without

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[2] Legible copies of the Master Lease and the Sublease are both contained in the Excerpt Record Volume 10 [originally designated as Supplement Volume].

interest in $10,000 increments annually commencing in the fifteenth year. [10 ER 1A, par 5 and Rider, par 5; 6 ER 48, par 56 {Howell Decl}]. The master lease provided that Petitioners were entitled to retain any excess rentals which they could obtain by subletting or assigning their leasehold interest [10 ER 1A, par. 31; 5 ER 29, par. 21 {Howell Decl}].[3] In 1978, Petitioners entered into a sublease with Respondent, Oshman, and carefully reserved any increases in market rental in the event Oshman discontinued its use of the premises [10 ER 1B, par. 13]. The sublease permitted Oshman to install its Abercrombie & Fitch retail store with a very low minimum rent with the expectation of market rent to be obtained through a percentage of gross sales. [10 ER 1B, par. 33, 40; 5 ER 29, par. 18, 21 {Howell Decl}]. To protect Petitioners economic interest in the leasehold, the sublease provided that in the event of an assignment or subletting by Oshman at a rental rate in excess of the sublease rental, such excess would inure to the benefit of and would be payable to the sublessor, Petitioners. [10 ER 1B, par. 13].

In late 1987, Columbia Savings acquired the fee interest in the city block including the building in which these leasehold premises were situated [6 ER 48, par. 4; 7 ER 49, Ex. 2a] and began efforts to develop the entire block, including demolition of improvements. [7 ER 49, Ex 68].

Even before their escrow to acquire the

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[3] The printed paragraph 13 which provides that any increase in rental as a result of sublease or assignment inures to the landlord ("Inure Clause") is deleted and replaced by the Rider Paragraph 31 which does not provide for any increased rentals to be paid to the landlord.

block had closed, and continuing on into 1988, Columbia attempted to negotiate a purchase of Petitioners' leasehold so that it could demolish the building containing the leased premises without complying with the relocation, substitute premises and free rent provisions of the Master Lease. [7 ER 49, Ex. 68 {Kruger Depo}; 6 ER 48, pars. 4,5,7,8 {Howell Decl}]. Columbia's first offer to Petitioners for Petitioners leasehold interest was one million seven hundred fifty thousand dollars ($1.75 million). [6 ER 48, p.2, par. 5 {Howell Decl}]. By May, 1988, Petitioners negotiations with Columbia indicated a price range for the Master Lease between $2.0 million and $2.5 million. [6 ER 48, par. 7,8 {Howell Decl}].

Meanwhile, Oshman decided to vacate. [6 ER 48, par. 23 {Howell Decl}; 7 ER 49, Ex. 20]. However, Oshman attempted to negotiate for a payment from Petitioners to terminate its sublease. [7 ER 49, Exs. 32, 33]. Petitioners negotiated with Oshman to terminate the sublease and were willing to pay Oshman some money for a "peaceful termination" of the sublease. In the fall of 1988, Petitioners arranged a loan to generate funds for said payment to Oshman. One of the assets intended to be used as collateral for the loan was Petitioners' interest in the Master Lease and Sublease which the lender valued at one million eight hundred fifty thousand dollars ($1.85 million). [6 ER 48, par. 19 {Howell Decl}].

By fall of 1988, without Petitioners' knowledge, Oshman had a consultant communicate with Columbia and offer its Sublease to Columbia [7 ER 49, Ex. 64 {Lubetkin Depo}, Ex. 63 {Moskowitz Depo}]. Columbia, on the other hand, began pressuring Petitioners to disclose their

"deal" with Oshman to Columbia. [8 ER 59 {Frost Decl}; 6 ER 48, pars. 24-39 {Howell Decl}].

To conclude the loan from which Petitioners intended to pay Oshman the money they had agreed to pay for termination of the Sublease, the lender required Columbia's approval to hypothecate the Master Lease. Columbia declined, on October 21, 1988, and the loan was immediately thereafter shut down without explanation. [6 ER 48, p. 9, pars. 21, 22 {Howell Decl}; 7 ER 49, Ex. 17]. Although Columbia's reason given was lack of information, the file notes of the lender's counsel, Faye Barta revealed that Ogilvie [for Columbia][4] had a conversation with the lender's counsel in which he gave inaccurate, misleading and derogatory statements regarding whether Petitioners had the capacity to hypothecate the Leasehold.[5]

On October 31, 1988, Petitioners received a written request from Oshman to consent to a sublease or assignment of the sublease to Columbia and offered Petitioners one hundred thousand dollars ($100,000). [7 ER 49, Ex. 22]. Unwilling to walk away from the economic benefits of their many years of effort and investment, valued at that time

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[4] In August, 1988, negotiations with Columbia were taken over by two individuals who represented themselves a development partners with Columbia: Respondents Scott Ogilvie and Tom Harrison ("Ogilvie").

[5] Ogilvie stated to Barta that the Petitioners might not be the real borrowers, that Starkman (prior fee owner) had never signed the May 5, 1987, Memorandum of Lease. Not only was it signed by Starkman, it was also notarized and recorded (recording No. 87-879756) and made part of the public record, i.e., public notice that Jenkins, previously a partner of Petitioner, JPL Properties, and previous named a lessee and a sublessor no longer had an interest in the leasehold at the time Columbia purchased the fee interest from Starkman in 1987. It was also, undoubtedly, in the Columbia lease files. [7 ER 49, Ex. 2].

effort and investment, valued at that time at between $1.75 million and $2.0 million, Petitioners refused. On November 3, 1988, Ogilvie wrote an inter-office memo to Don Phan (a Columbia employee) requesting his assistance in an economic analysis of the Master Leasehold for preparation of a lease buy-out offer. Ogilvie's memo stated that Columbia might cause a default at the Master Lease level, and that Columbia might find itself deemed to be "acting in bad faith in an attempt to pressure them [Petitioners] into selling their leasehold position to us." [7 ER 49, Ex. 1C, p.2]. Phan responded by referring Ogilvie to the demolition provision in the Master Lease which provides that in the event the landlord decides to demolish the building, the landlord must give Petitioners two and one-half years' notice of its intent to demolish, give a lease extension, free rent and substitute space during the down time, as well as comparable space in the newly constructed building [see Master Lease, Rider, paragraph 33 {10 ER 1A}]. Phan suggested that Columbia give Petitioners notice of its intent to demolish to give Petitioners an incentive "to settle." He also wrote "Note that the lease does not specify comparable space [for the down time], so we could theoretically give them space south of Venice [about ten miles south of Beverly Hills in a high crime, low rent area] if we wanted to." [7 ER 49, Ex 1b].

In early November, 1988, Ogilvie persuaded Petitioners to disclose their "deal" with Oshman. [6 ER 48, par. 29 {Howell Decl}]. On November 15, 1988, Columbia delivered a letter offer to Petitioners to purchase Petitioners' Master Leasehold interest (including the Sublease) for the sum of seven hundred thousand dollars ($700,000), [7 ER 49, Ex 25],

thereby reducing Columbia's former offer of $2.0 million to $700,000 [Ogilvie knew from Petitioners' disclosure of their deal with Oshman that Petitioners intended to pay Oshman approximately $600,000 which included an attorney fee judgment from a prior litigation matter].[6] Ogilvie also undoubtedly knew that his offer was void of any economic benefit for Petitioners because Columbia would have been required to repay the $100,000 security deposit which Petitioners had paid to Columbia's predecessor in 1971. This offer then amounted to the approximate sum of $625,000 which Petitioners had promised to pay Oshman for the attorney fee judgment and to terminate the lease, plus the return of Petitioners' security deposit. Petitioners immediately told Ogilvie that they believed he "had been acting in bad faith throughout" and they left his office. [6 ER 48, p.14, lns 16-18]. They then responded by letter refusing the offer and suggesting that Columbia add the number "2" in front of the $700,000. [7 ER 49, Ex.26].

On November 29, 1988, and December 1, 1988, Columbia (which had been encouraging Petitioners to terminate Oshman's sublease) served Petitioners with a Notice that Petitioners were in breach of the "dark clause" of the Master Lease (the clause

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[6] Petitioners and Oshman had a prior litigation matter relating to Oshman's weak sales effort in the store and its inability to pay any percentage rent from sales as expected. Oshman's cross-complained relating to parking issues. There was no trial in the matter; the parties submitted the case on declarations. Neither party received any damages from the other; however, Oshman was deemed the prevailing party and received a judgment against Petitioners for approximately $300,000 for attorney fees. The parties had the same District Court judge in that matter as in the instant case.

prohibiting vacancy in the premises). This Notice was sent as a result of Oshman's vacating the premises on or about the end of October, 1988. Both notices included a notice of intention to demolish. [7 ER 49, Exs. 29,30]. These notices were followed by a Notice to Perform Covenant of Lease or Surrender Possession, which was followed by Notice of Belief of Abandonment on December 14, 1988. [7 ER 49, Exs. 36, 37]. On December 20, Columbia filed a Declaratory Relief Action to have the Master Lease terminated and/or to eliminate the Landlord's obligations to the Lessee under the demolition provision of the Master Lease, and recorded a Notice of Pendency of Action against the property. [7 ER 49, Exs. 40, 41].

To respond to this threat of forfeiture pressed upon Petitioners by Columbia, Petitioners requested that Oshman temporarily re-occupy the premises to cure the "dark clause" violation cause by Oshman's vacating the premises. Oshman agreed but did not desire to undertake the expense of installing a full retail store. The negotiations were carried on between Petitioner's transactional lawyer, Mitchell Ezer, Esq., and Oshman's transactional lawyer, Ralph Zarefsky, Esq. Subsequently, Ralph Zarefsky, Esq., has also handled Oshman's litigation matters herein.

Petitioners and Oshman entered into the agreement on December 20, 1988, "December Agreement" reflecting this temporary solution and prevent a termination of the Master Lease by Columbia. [7 ER 49, Exs. 33, 35-39, 42; 6 ER 48, pars. 33-44 {Howell Decl}]. Petitioners did not intend by this "December Agreement" to modify the sublease in any manner, but only to permit Oshman to re-occupy the premises on a temporary basis

without engaging in the expense of starting up a major retail store and for the specific purpose of defeating Columbia's allegation of breach of the "dark clause." [6 ER 35 {Decl of Mitchell Ezer, Esq., Decl of Chris Clark, Esq. attaching deposition testimony of Mr. Ezer}; 6 ER 38 {Supplemental Declaration of Attorney Ezer}; 6 ER 46 {Declaration of Attorney Ezer}]. Oshman re-entered the premises, using it for an office location. [6 ER 48, par. 48 {Howell Decl}].

Columbia commenced dealing directly with Oshman to acquire the subleasehold interest for itself. Letters between Oshman and Columbia representatives reveal that Columbia's purpose in acquiring the sublease was to exert pressure on Petitioners to give up their leasehold interest without receiving fair value, and that Oshman was not only aware of and participated in that plan, but also, suggested the means by which to achieve such an objective. [7 ER 49, Exs. 43-55]. Particularly significant is the letter from Attorney Zarefsky to a Columbia lawyer [7 ER 49, Ex 50] by which Mr. Zarefsky proposes to Columbia that if Columbia would purchase the Oshman judgment which it held against Petitioners [see fn. 5, above], Columbia would never have to pay Petitioners for their Leasehold because Columbia could used the judgment to levy against the Master Lease and obtain title to the Master Lease by that method.

Columbia and Oshman reached agreement for the sale and assignment to Columbia of Oshman's subleasehold interest (for $620,000) [7 ER 49, Ex 56, par. 3, p. 000182 {the Assignment}]. This Assignment also provides that none of the money received by Oshman should be designated rent [that would violate paragraph 13 of the sublease {the "inure clause" by which any increase in rent

inures to the Petitioners in the event Petitioners consent to a sublease or an assignment, 10 ER 1B, par 13}}. Rather, the money received by Oshman was to be designated leasehold improvements [which belonged to Petitioners, not Oshman], and cost of Oshman's moving out [they had actually moved out six months prior to this agreement! [7 ER 49, Ex 56, par. 1(b) 1, 3(c)]. On May 16, 1989, Petitioners received a letter from Columbia and Oshman jointly requesting that Petitioners consent to an assignment of the Sublease to Columbia [and its subsidiaries], requesting a response within ten days. On May 23, Petitioners notified Oshman and Columbia that Petitioners would not consent to the assignment. It indicated that reasons for the refusal included but were not limited to the fact that the proposed assignee was "a financial tenant rather than a retail tenant and no percentage income from gross sales could be realized . . " Petitioners further advised that they had "many reasons for refusing to [the] requested assignment . . . and reserve[d] all rights to refuse on [these] many reasons." [1 ER 13, pars 22-25, and Exs. I, J {Howell Decl}].

Columbia and Oshman then sent a joint letter to Petitioners, dated June 2, 1989, indicating that they intended to proceed with the assignment without Petitioners' consent. On June 9, 1989, Petitioners gave a further response stating further reasons why Petitioners could not consent to the requested assignment, including the fact that Petitioners had the premises on the market for subleasing at market rent and would not be receiving market rent from the proposed assignment. Petitioners also reminded Respondents in that communication that Respondents had been trying to wrest from Petitioners their leasehold interest

for quite some time without paying fair value for it. [1 ER 13, par. 26, 27, and Exs. K, L {Howell Decl}].

In July, 1989, Petitioners received a notice from the United States Marshall's office that a sale of the Master Leasehold would be held on August 16, 1989, pursuant to a levy by Oshman on its attorney fee judgment against Petitioners. Petitioners learned later that Columbia had acquired the judgment and intended to bid for the Master Lease at the Marshall's sale. [7 ER 49, Ex. 59; 5 ER 28, and Ex. C {Attorney Menke Decl}]. On August 16, Petitioner JPL Properties filed a Chapter 11 Bankruptcy petition to avert the Marshall's sale. As party of JPL's Bankruptcy filing requirements, Petitioners requested that Oshman forward its current Certificate of Insurance to Petitioners. [5 ER 29, par. 13 and Ex H {Howell Decl}]. Petitioners later learned that Oshman had proposed the sale of its attorney fee judgment against Petitioners to Columbia for Columbia's use to obtain the Master Leasehold by levy, rather than by paying Petitioners fair value. [7 ER 49, Ex. 50].

In September, 1989, Columbia served a motion on JPL Properties in the Bankruptcy proceeding, claiming to be the new subtenant by virtue of the purported assignment [to which Petitioners had refused consent]. Columbia was requesting relief from the automatic stay to enable Columbia to demolish the building.

Upon learning Columbia and Oshman had actually entered into an assignment, Petitioners went to the premises and discovered they were locked out and an armed guard had been posted in the premises. [5 ER 29, par. 14 {Howell Decl}; 1 ER 13, pars.

29-36 {Howell Decl}]. Shortly thereafter, Petitioners gave Oshman Notice of Termination of the Sublease pursuant to paragraph 13 [10 ER 1B], on the ground that Oshman had assigned its sublease without Petitioners' consent. [1 ER 13, par. 37 {Howell Decl}].

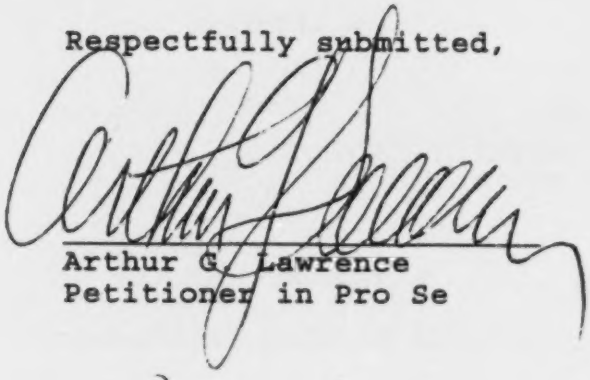
CONCLUSION

Public policy mandates that Rule 56 (FRCP) be stated in a form which is easily understood and followed by the courts to preserve the rights of small business owner-litigants who have no place else to go to protect their economic interests other than the Judicial System. If the large corporations which can afford unlimited legal fees to retain lawyers adept at arranging words on a page which easily persuade courts to grant summary judgments which deprive the small business owner of hard earned economic benefits, then the American judicial system is not working.

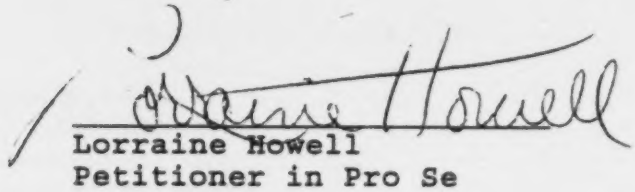
It is only through the American judicial system that the small business owner can protect his or her assets, the fruits of hard earned efforts, from the jaws of the predator-type entity or individual with ample financial means to carry out such objectives.

Therefore, Petitioners pray that this Court will review Rule 56 (FRCP) and determine that Rule 56 was ignored in this case, as well as determine whether modifications are necessary to enable courts to follow it faithfully.

Respectfully submitted,



Arthur G. Lawrence
Petitioner in Pro Se



Lorraine Howell
Petitioner in Pro Se

APPENDIX A

FILED
MAY 22, 1996
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MELISSA HOLDINGS, INC., (erroneously identified as Development Partners, Inc., formerly known as Wilshire Masterpiece, Inc., formerly known as Wilshire-Canon, Inc. formerly known as 338 Rodeo Corporation), a California corporation; and LIBERTY SERVICE CORPORATION, a California corporation, Plaintiffs, v. JPL PROPERTIES, a purported California general partnership; LORRAINE HOWELL, an individual; ARTHUR G. LAWRENCE, an individual; DR. KARL H. STURCKOW, an individual, Defendants,	No. 94-56314 D.C. No. CV-91-03828-RG
JPL PROPERTIES, a California general partnership; ARTHUR G. LAWRENCE; LORRAINE HOWELL; and KARL H. STURCKOW, Cross-Complainants-Appellants, v.	

FEDERAL DEPOSIT INSURANCE CORPORATION (formerly known as Resolution Trust Corporation), as Receiver for Columbia Savings and Loan Association, 338 Rodeo Corporation, Wilshire-Canon Inc., Cross-Defendants, and SCOTT V. OGILVIE and THOMAS HARRISON, OSHMAN SPORTING GOODS, Cross-Defendants-Appellees.	
MELISSA HOLDINGS, INC., (erroneously identified as Development Partners, Inc., formerly known as Wilshire Masterpiece, Inc., formerly known as Wilshire-Canon, Inc. formerly known as 338 Rodeo Corporation), a California corporation; and LIBERTY SERVICE CORPORATION, a California corporation, Plaintiffs-Cross-Defendants-Appellants, v. JPL PROPERTIES, a purported California general partnership; LORRAINE HOWELL, an individual; ARTHUR G. LAWRENCE, an individual; DR. KARL H. STURCKOW, an individual, Defendants-Cross-	No. 94-56419 D.C. No. CV-91-03828-RG

Complainants-Appellees.

MELISSA HOLDINGS INC., (erroneously identified as Development Partners, Inc., formerly known as Wilshire Masterpiece, Inc., formerly known as Wilshire-Canon, Inc. formerly known as 338 Rodeo Corporation), a California corporation; and LIBERTY SERVICE CORPORATION, a California corporation,

Plaintiffs,

v.

JPL PROPERTIES, a purported California general partnership; LORRAINE HOWELL, an individual; ARTHUR G. LAWRENCE, an individual; DR. KARL H. STURCKOW, an individual,

Cross-Complainants-Appellants,

FEDERAL DEPOSIT INSURANCE CORPORATION (formerly known as Resolution Trust Corporation), as Receiver for Columbia Savings and Loan Association, 338 Rodeo Corporation, Wilshire-Canon Inc., Development Partners, Inc., SCOTT V. OGILVIE, THOMAS HARRISON, and OSHMAN SPORTING GOODS,

Cross-Defendants-Appellees.

MELISSA HOLDINGS, INC.,

No. 95-55072

D.C. No. CV-91-03828-RG

(erroneously identified as Development Partners, Inc., formerly known as Wilshire Masterpiece, Inc., formerly known as Wilshire-Canon, Inc. formerly known as 338 Rodeo Corporation), a California corporation; and LIBERTY SERVICE CORPORATION, a California corporation, Plaintiffs, v. JPL PROPERTIES, a purported California general partnership; LORRAINE HOWELL, an individual; ARTHUR G. LAWRENCE, an individual; DR. KARL H. STURCKOW, an individual, Defendants, ARTHUR G. LAWRENCE, Cross-Complainant, and v. JPL PROPERTIES, a California general partnership; LORRAINE HOWELL; KARL H. STURCKOW, Cross-Complainants-Appellants, v. FEDERAL DEPOSIT INSURANCE CORPORATION (formerly known as Resolution Trust Corporation), as Receiver for Columbia Savings and Loan	No. 95-55608 D.C. No. CV-91-03828-RG ORDER

Association, 338 Rodeo)
Corporation, Wilshire-Canon)
Inc., Development Partners,)
Inc., SCOTT V. OGILVIE,)
THOMAS HARRISON, and)
OSHMAN SPORTING GOODS)
)
Cross-Defendants-)
Appellees.)
)

Before: SKOPIL, CANBY, and LEAVY, Circuit Judges.

Appellants' petition for rehearing is denied.

APPENDIX B

FILED
MAR 14, 1996
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MELISSA HOLDINGS, INC., (erroneously identified as Development Partners, Inc., formerly known as Wilshire Masterpiece, Inc., formerly known as Wilshire-Canon, Inc. formerly known as 338 Rodeo Corporation), a California corporation; and LIBERTY SERVICE CORPORATION, a California corporation, Plaintiffs, v. JPL PROPERTIES, a purported California general partnership; LORRAINE HOWELL, an individual; ARTHUR G. LAWRENCE, an individual; DR. KARL H. STURCKOW, an individual, Defendants,	No. 94-56314 D.C. No. CV-91-03828-RG
JPL PROPERTIES, a California general partnership; ARTHUR G. LAWRENCE; LORRAINE HOWELL; and KARL H. STURCKOW, Cross-Complainants-Appellants, v.	

FEDERAL DEPOSIT INSURANCE CORPORATION (formerly known as Resolution Trust Corporation), as Receiver for Columbia Savings and Loan Association, 338 Rodeo Corporation, Wilshire-Canon Inc., Cross-Defendants, and SCOTT V. OGILVIE, THOMAS HARRISON and OSHMAN SPORTING GOODS Cross-Defendants-Appellees.	
MELISSA HOLDINGS, INC., (erroneously identified as Development Partners, Inc., formerly known as Wilshire Masterpiece, Inc., formerly known as Wilshire-Canon, Inc. formerly known as 338 Rodeo Corporation), a California corporation; and LIBERTY SERVICE CORPORATION, a California corporation, Plaintiffs-Cross-Defendants-Appellants, v. JPL PROPERTIES, a purported California general partnership; LORRAINE HOWELL, an individual; ARTHUR G. LAWRENCE, an individual; DR. KARL H. STURCKOW, an individual,	No. 94-56419 D.C. No. CV-91-03828-RG

Defendants-Cross-Complainants-Appellees.

MELISSA HOLDINGS INC., (erroneously identified as Development Partners, Inc., formerly known as Wilshire Masterpiece, Inc., formerly known as Wilshire-Canon, Inc. formerly known as 338 Rodeo Corporation), a California corporation; and LIBERTY SERVICE CORPORATION, a California corporation,

Plaintiffs,

v.

JPL PROPERTIES, a purported California general partnership; LORRAINE HOWELL, an individual; ARTHUR G. LAWRENCE, an individual; DR. KARL H. STURCKOW, an individual,

Cross-Complainants-Appellants,

No. 95-55072

D.C. No. CV-91-03828-RG

FEDERAL DEPOSIT INSURANCE CORPORATION (formerly known as Resolution Trust Corporation), as Receiver for Columbia Savings and Loan Association, 338 Rodeo Corporation, Wilshire-Canon Inc., Development Partners, Inc., and SCOTT V. OGILVIE, THOMAS HARRISON, and OSHMAN SPORTING GOODS,

Cross-Defendants-Appellees.

MELISSA HOLDINGS, INC., (erroneously identified as Development Partners, Inc., formerly known as Wilshire Masterpiece, Inc., formerly known as Wilshire-Canon, Inc. formerly known as 338 Rodeo Corporation), a California corporation; and LIBERTY SERVICE CORPORATION, a California corporation, Plaintiffs, v. JPL PROPERTIES, a purported California general partnership; LORRAINE HOWELL, an individual; ARTHUR G. LAWRENCE, an individual; DR. KARL H. STURCKOW, an individual, Defendants, ARTHUR G. LAWRENCE, Cross-Complainant, and v. JPL PROPERTIES, a California general partnership; LORRAINE HOWELL; KARL H. STURCKOW, Cross-Complainants-Appellants, v.	No. 95-55608 D.C. No. CV-91-03828-RG MEMORANDUM·····

B iv

····· This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36.3.

FEDERAL DEPOSIT INSURANCE CORPORATION (formerly known as Resolution Trust Corporation), as Receiver for Columbia Savings and Loan Association, 338 Rodeo Corporation, Wilshire-Canon Inc., Development Partners, Inc., and SCOTT V. OGILVIE, THOMAS HARRISON, and OSHMAN SPORTING GOODS

Cross-Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
Richard A. Gadbois, Jr., District Judge, Presiding

Argued and Submitted March 4, 1996
Pasadena, California

Before: SKOPIL, CANBY, and LEAVY, Circuit Judges.

I. DIRECT APPEAL (No. 94-56314)

We affirm the judgment of the district court that the December 20, 1988 Agreement between JPL Properties ("JPL") and Oshman Sporting Goods, California ("Oshman") modified the sublease by deleting the requirement that the premises were for retail sales only. The agreement is not ambiguous on its face and is not subject to extrinsic interpretations which differ from the written agreement. See., e.g., Brinderson-Newberg v. Pacific Erectors, 971 F.2d 272, 278-80 (9th Cir. 1992).

We affirm the judgment of the district court that the assignment of the sublease by Oshman to Development Partners, Inc. ("Development Partners") (Melissa Holdings, Inc., and Liberty Service Corporation) was valid. JPL's primary reason for its refusal to consent to the transfer was that the assignee was not a retail tenant. However, the December 20, 1988 Agreement deleted that requirement; therefore, the refusal to consent was unreasonable. The assignment occurred in 1989, therefore the applicable law was the holding in Kendall v. Ernest Pestana, Inc., 709 P.2d 837 (Cal.1985), that absent a written standard for giving or withholding consent, a commercial lease contains an implied standard that the landlord's consent may not be unreasonably withheld. The California statutes, Cal. Civ. Code §§ 1995.260 and 1995.270, were effective January 1, 1990, and therefore do not apply to the assignment in this case.

We reject JPL's argument that it had an independent right to terminate the sublease to protect its right to appreciated rental value. The lease in this case provided that any increase resulting from an assignment at an increased rental would go directly to JPL. The provision protects JPL's right to appreciated rental values, but does not grant JPL an independent right to terminate the sublease. JPL's reliance on Carma Developers v. Marathon Deve. Cal., 826 P.2d 710 (Cal.1992) is misplaced because the lease in Carma had a separate provision allowing the lessor the right to terminate the lease upon notice of a proposed assignment so that the lessor could deal directly with the new tenant. The lease in this case did not have such a provision.

We affirm the order of the district court that there is not basis for a conspiracy claim, no breach of the covenant of good faith, and no claim for interference with economic advantage. JPL was in fact "sandwiched" between Resolution Trust Company ("RTC") as leasehold owner on one side, and RTC's financially affiliated corporations as assignees of the sublease on the other side. There is no legal authority which directs that such a position, without more material evidence of bad faith or wrongdoing, is actionable by JPL.

We have examined JPL's remaining arguments and find no basis for reversing the judgment of the district court.

II. CROSS-APPEAL (No. 94-56419)

In the cross-appeal, Development Partners argues that the district court's award of interest was in error. JPL accepted sublease rent through its banking collection agent from June 1989 to December 1989. JPL then refused the tenders of sublease rent in January and February 1990. Under California law, the tender of rent which is refused stays the running of interest. Cal Civ. Code § 1504; Rose v. Hecht, 211 P.2d 347, 349 (Cal. 1949). Therefore, the district court erred in awarding accrued interest on rent owing from January 1990 to March 1994. We remand the cross-appeal to the district court to recalculate the accounting claims.

III. RELATED APPEALS (Nos. 95-55072 and 95-455608)

We affirm the attorneys' fees award against JPL Properties and its three individual partners. Karl Sturckow, along with his partners, is jointly and severally liable under contract for the award of attorneys' fees.

CONCLUSION

The district court's rulings challenged in the direct appeal (No. 94-56314) are AFFIRMED. The district court's award of pre-judgment interest challenged in the cross-appeal (No. 94-56419) is VACATED and REMANDED for further proceedings. The award of attorneys' fees challenged in the related appeals (Nos. 95-55072 and 95-55608) is AFFIRMED.

APPENDIX C

FILED
SEP 24 1992
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY ---- DEPUTY

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Attorneys for Cross-Defendants

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DEVELOPMENT PARTNERS, INC., (formerly known as WILSHIRE MASTERPIECE, INC., formerly known as WILSHIRE-CANON, INC., formerly known as 338 RODEO CORPORATION), a California corporation; and LIBERTY SERVICE CORPORATION, a California corporation,

Plaintiffs,

vs.

JPL PROPERTIES, a purported California general partnership; LORRAINE HOWELL, an individual; ARTHUR G. LAWRENCE, an individual; DR. KARL H. STURCKOW, an individual; and DOES 1 THROUGH 20, INCLUSIVE,

Defendants.

JPL PROPERTIES, a California general partnership; ARTHUR G. LAWRENCE, LORRAINE HOWELL, and KARL G. STURCKOW,

Cross-Complainants,

CASE NO. CV91-3828 RG (JRx)

(PROPOSED) ORDER ON MOTION FOR PARTIAL SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, FOR SUMMARY ADJUDICATION OF ISSUES.

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77 (D).

Date: April 20, 1992
Time: 10:00 A.M.
CTRM: 16

Honorable Richard A. Gadbois, Jr.

Cross-
Complainants,

vs.

RESOLUTION TRUST CORPORATION, AS RECEIVER FOR COLUMBIA SAVINGS & LOAN ASSOCIATION, 338 RODEO CORPORATION, WILSHIRE-CANON INC. DEVELOPMENT PARTNERS, INC., LIBERTY SERVICE CORPORATION, OSHMAN SPORTING GOODS, CALIFORNIA, SCOTT V. OGILVIE and THOMAS HARRISON,

Cross-Defendants.

Plaintiff and Cross-Defendant Development Partners, Inc., and Liberty Service Corporation and Cross-Defendant Resolution Trust Corporation, in its capacity as Receiver of Columbia Savings & Loan Association, Oshman Sporting Good Company, California, Scott V. Ogilvie and Thomas Harrison's Cross-Motion for Partial Summary Judgment, or in the Alternative for Summary Adjudication of Issues came on regularly for hearing before this court on April 20, 1992.

After considering the moving and opposition papers, arguments of counsel and all other matters presented to the Court

IT IS HEREBY ORDERED THAT:

The following issues in the complaint and cross-complaint are established without substantial controversy as against defendants and cross-complainants and no further proof thereof shall be required at the trial of this action and final judgment in this action shall in addition to any matter determined at the trial, be based on these issues so established:

1. The December 20, 1988 Agreement between Oshman Sporting Goods Co., California ("Oshman") on the one hand and Arthur Lawrence, Lorraine Howell, Karl Sturckow, Horace Jenkins and JPL Properties (the "Lawrence and Howell Group") modified the sublease entered into in 1978 between Karl Sturckow, Lorraine Howell, and Horace Jenkins on the one hand and Oshman on the other by deleting the requirement that Oshman use the premises for retail sales.

2. The assignment of the sublease from Oshman to Wilshire-Canon, Inc., and Liberty Service Corporation (Wilshire Canon/Liberty Service") was valid.

3. The Lawrence and Howell Group's refusal to

consent to the assignment of the sublease on the grounds of percentage rent alone was unreasonable.

4. Wilshire-Canon/Liberty Service's possession of the premises as of June 2, 1989 was lawful.

Dated: 9-24-, 1992

Richard A. Gadbois, Jr.

HONORABLE RICHARD A. GADBOIS, JR.
UNITED STATES DISTRICT JUDGE

Respectfully submitted.

SELMAN, BREITMAN & BURGESS

By: _____
ELAINE K. FRESCH
Attorney for Cross-Defendants
DEVELOPMENT PARTNERS, INC., LIBERTY SERVICE CORPORATION, RESOLUTION TRUST CORPORATION IN ITS CAPACITY AS RECEIVER OF COLUMBIA SAVINGS AND LOAN ASSOCIATION, SCOTT V. OGILVIE, THOMAS HARRISON

APPENDIX D

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Development Partners, Inc. et al. Plaintiffs, v. JPL Properties, et al., Defendants.	CASE NO. CV 91-3828 RG(JRx) ORDER THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP. RULE 77(d)
JPL Properties, et al., Cross-Complainants, v. Columbia Savings, et al., Cross-Defendants	

TO ALL PARTIES AND THEIR ATTORNEY OF RECORD:

I. Introduction

A. Background Facts

This action concerns a sublease of a portion of a commercial/office building on Wilshire Boulevard in Beverly Hills. In 1971, a written lease was entered into between the prior owners of the building and individuals Dr. Piper and Dr. Jenkins. Dr. Piper and Dr. Jenkins assigned their interests in the lease to defendants/cross-claimants Arthur Lawrence, Karl Sturckow, and Lorraine Howell. Cross-claimant JPL properties also alleges that it holds an interest in this lease, although it has never appeared on the lease. [Defendants and cross-claimants will hereinafter be referred to as "Howell".] The lease term was for 25 years.

In 1978, Howell entered into a sublease with cross-defendant Oshman Sporting Goods Company ("Oshman"). The sublease term was from April of 1978 to January of 1997. The rent under the sublease included a minimum monthly rent and a possible percentage rent if 4% of gross sales exceeded the minimum rent. The sublease required Oshman to use the premises for retail sales and for no other purpose.

Paragraph 13 of the sublease provided:

> 13. ASSIGNMENT, SUBLETTING, ET.--Lessee shall not assign this lease or any interest therein, and shall not sublet the demised premises or any portion thereof, or any right or privilege appurtenant thereto, or suffer any other person ... to occupy or use the demised premises or any portion thereof, without the prior written consent of Lessor.
>
> * * * *
>
> Any such assignment, subletting occupancy or use without Lessor's prior written consent shall be void and, at Lessor's option, shall terminate this lease.
>
> * * * *
>
> If lessee shall have obtained Lessor's prior written consent to either assignment, or subleasing, then any rental paid by such assignee, or sublessee, in excess of the rental provided by the lease, shall be for the benefit of and shall be immediately paid to Lessor.

Howell sued Oshman for the first time in 1983, charging Oshman with fraud and failure to build sales in the store. In that action, this Court entered judgment against Howell, and found that Oshman had been using its best efforts to operate a store at that location.

On December 20, 1988, Oshman and Howell entered into an agreement, which was also executed by JPL Properties, withdrawing their appeals from your judgment against JPL and modifying certain provisions of the sublease. Paragraphs 3 and 4 of that Agreement provide:

> 3. Plaintiffs hereby forever waive any claim they now have or may have in the future that Oshman has breached the sublease, broken any law, or violated any duty, by not utilizing the premises for the purpose of conducting retail sales. Plaintiffs covenant that they will not assert in any proceeding of any kind that the failure to conduct retail operations on the premises at any time breached the sublease, broke any law or violated any duty. Any provision in this sublease inconsistent with the provisions of this Paragraph is hereby deleted.
>
> 4. Commencing December 27, 1988, Oshman will utilize the premises for whatever purposes it in its sole discretion determines, and will keep the premises open during normal business hours.

See Exhibit G to the Declaration of Alvin Lubetkin (attached to Cross-Defendants Memorandum of Points and Authorities filed March 30, 1992).

On May 16, 1989, Oshman, Development Partners, Inc.[1] and Liberty Service Corporation (hereinafter collectively known as ("Development Partners") requested that Howell consent to an assignment of the sublease to Development Partners.[2] See Lubetkin Declaration Exhibit A.

On May 23, 1989, Howell notified Oshman and Development Partners that they would not consent to the assignment. See Lubetkin Declaration Exhibit B. They indicated that the chief reason for their refusal was because the intended Sublessee was "a financial tenant rather than a retail store and no percentage income from gross sales could be realized from such a Sub-Sublease." Id. They further advised that they "ha[d] any reasons for refusing to consent to [the] requested assignment of Sublease and ... reserve[d] all rights to refuse on [their] many reasons." Id.

On June 2, 1989, Oshman and Development Partners notified Howell of their belief that under the case law at that time, a landlord could not unreasonably withhold consent to an assignment. Lubetkin Declaration Exhibit C. Since Oshman and Development Partners believed that the refusal to consent was unreasonable, they informed Howell of their intent to assign the sublease to Development Partners. One June 2, 1989, the premises were actually assigned to Development Partners, who then took possession. See Lubetkin Declaration Exhibit F.

On June 9, 1989, Howell sent another letter to Development Partners expressing their shock at Development Partners' actions and explaining their belief that any assignment was void without their written consent. See Lubetkin Declaration Exhibit D. Oshman responded to this correspondence with a letter of its own, disputing Howell's claims and again asserting that it had legally assigned the sublease to Development Partners. Id.

From June of 1989 through December of 1989, Development Partners continued to pay rent to Howell through Howell's collection agent, Bank of America. In October and November of 1989, Howell sent a Notice and Demand to Oshman, Bank of America, and Columbia Savings and Loan, giving notice that it was terminating the sublease, canceling the collection account, and indicating that the master lessor was in breach of the master lease.

---

[1]Plaintiff Development Partners was formerly known as Wilshire Masterpiece Inc., formerly known as Wilshire-Cannon Inc., which was formerly known as 338 Rodeo Corporation.

[2]In the letter to Howell, Oshman noted that Development Partners and Liberty Service are subsidiaries of Columbia Savings and Loan Association.

B. The Present Action

Plaintiffs Development Partners and Liberty Service filed in L.A. Superior Court this action against defendants JPL Properties, Lorraine Howell, Arthur Howell, and Dr. Karl Sturckow seeking the following declaratory relief:

1. Declaring that JPL has no enforceable interest whatsoever in the Premises, in the Lease, or in the Sublease;

2. Declaring that the Assignment of the Sublease by Oshman to plaintiffs was valid and effective against defendants;

3. Declaring that defendants have waived any objection they purported to have to the Assignment, are estopped to object to the Assignment, and have ratified the assignment;

4. Declaring that, provided Development Partners tender to howell, Lawrence and Sturckow all rent due and ever to become due under the Sublease, defendants will no longer have any possible possessory interest or other interest in the premises, and Development Partners may thereupon tear down the existing building including the Premises, and otherwise deal with the Premises as it sees fit;

5. Solely in the alternative to Number four, above, declaring that on a date certain, two and one half years from the date of Development Partners gave notice to defendants to its intention to tear down and replace the building, Development Partners may tear down the existing building including the Premises in accordance with Paragraph 33 of the lease;

6. Declaring that each and every one of defendants' contentions as stated in their "Notice and Demand" are not well taken, and that Development partners is not in breach of the lease;

7. Otherwise declaring the respective rights and obligations of the parties in the Premises, and under the Lease and Sublease.

Defendants filed a cross-claim against plaintiffs and various other parties. The cross-claim stated causes of action for the following: breach of contract, recision, breach of the covenant of good faith and fair dealing, trespass, conversion, ejectment, termination of sublease, constructive eviction, negligent misrepresentation, fraudulent misrepresentation, conspiracy to defraud, interference and conspiracy to interfere with contractual

relationship, intentional interference and conspiracy to interfere with prospective economic advantage, constructive trust, accounting, unjust enrichment, promissory estoppel, equitable estoppel, declaratory relief, and injunction.

In March of 1991, the Resolution Trust Corporation ("RTC") took over as receiver for Columbia Savings and Loan. This suit was subsequently removed to federal court.

C. This Court's Prior Rulings

On April 10, 1992, Plaintiff Development Partners, Inc. and Cross-Defendant Resolution Trust Corporation in its capacity as Receiver of Columbia Savings & Loan Association filed cross-motions for partial summary judgment. On September 24, 1992, this Court issued it Order, holding that:

1. The December 20, 1988 Agreement between Oshman and Howell modified the sublease entered into in 1978 between Karl Sturckow, Lorraine Howell and Horace Jenkins on the one hand and Oshman on the other by deleting the requirement that Oshman use the premises for retail sales.

2. The assignment of the sublease from Oshman to Liberty was valid.

3. The Howell Group's refusal to consent to the assignment of the sublease on the grounds of percentage rent alone was unreasonable.

4. Wilshire-Canon/Liberty Service's possession of the premises as of June 2, 1989 was lawful.

D. The Present Motion

Oshman now moves this court for summary judgment on the cross-complaint on the basis that this Court's September 24, 1992 Ruling has disposed of that portion of the cross-complaint against Oshman. In the alternative, Oshman moves for partial adjudication of the following facts that it claims are without substantial controversy:

1. That Oshman made no false promises or representations;

2. That cross-complainants have suffered no damage;

3. That Oshman did not engage in an unlawful conspiracy with any cross-defendant;

4. That cross-complainants cannot rescind the December 20, 1988 agreement;

5. That Oshman neither interfered with nor

conspired to interfere with any prospective economic advantage which cross-complainants may have had;

6. That Oshman did not breach the sublease; and

7. That Oshman did not violate the covenant of good faith and fair dealing.

II. Analysis

A. Summary Judgment Standard

Under the Celotex Corp. v. Catrett, 477 U.S. 317 (1986) and Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) standard, the principal question that arises on a motion for summary judgment is whether factual issues of legal significance -- "material facts" -- remain to be resolved at trial. It is not enough for the party opposing the motion for summary judgment merely to point to disputes of fact. It is the burden of the non-moving party to make a showing sufficient to establish the existence of an element essential to that party's case, and one which that party will bear the burden of proof at trial.

B. Analysis of Oshman's Summary Judgment Arguments

This case is about the legal rights and responsibilities of sophisticated parties under written agreements. Oshman contends that this lawsuit really arose because Howell has always been disappointed with the deal they made and thus, they have trying to undue that deal.[3]

This summary judgment motion is based on Oshman's belief that because this Court's prior ruling determined that the assignment of the Oshman sublease was valid, there is nothing left to try against Oshman.

On April 20, 1992 all parties came before this court on cross-motions for partial summary judgment. At that time all parties agreed that "substantially all these claims (all twenty four causes of action pleaded in the cross-complaint) hinge upon the determination as to whether Oshman validly assigned its interest under the sublease to Partners." See Howell's Motion for Partial Summary Judgment, 2:17-3:2.

On September 25, 1992, this Court entered its order, ruling that the withholding of consent by Howell was unreasonable, and that the assignment of the

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[3] Howell first filed the initial litigation seeking to terminate Oshman's tenancy and charging fraud. Howell then tried to buy out Oshman but never produced the money to do so. Finally, Howell filed this cross-complaint, asserted that they have been damaged by Oshman.

sublease from Oshman to Liberty was valid. Oshman now claims that of the 24 cause of action in the cross-complaint, 13 of which are asserted against Oshman, six of the causes of action were concluded by the Court's determination that the assignment was valid. These include:

Second Cause of Action: breach of contract
Third Cause of Action: recession
Fourth Cause of Action: Breach of the covenant of good faith and fair dealing
Eighth Cause of Action: Termination of the sublease
Ninth Cause of Action: Constructive Eviction
Twenty-Fourth Cause of Action: Conspiracy to Constructively Convict

Howell alleges that Oshman breached the sublease by assigning its interest to Liberty without their consent, and vacating the premises and transferring possession to Liberty. Cross-Complaint ¶ 52. This Court found, however, that the assignment was valid, that Howell's refusal to consent to the assignment was unreasonable and that Liberty's possession of the premises as of June 2, 1989 was lawful. See Order, dated September 25, 1992. That Order resolves the breach of contract cause of action in Oshman's favor.

This Court's ruling that the assignment was valid also establishes that the covenant of good faith and fair dealing was not breached. The covenant of good faith and fair dealing is a contract term and requires that one contracting party not deprive the other of benefits under the contract. Air-Sea Forwarders, Inc. v. Air Asia Co., Ltd., 880 F.2d 176, 186 (9th Cir. 1989). Because this Court found that the assignment was valid and the Howell Group was not deprived of its rights under the contract, this cause of action is also resolved in Oshman's favor.

This Court's ruling that Liberty was in lawful possession of the premises eliminates the cause of action for conscructive eviction. Howell has no right to physical occupancy of the premises and therefore Howell cannot claim to have been dispossessed.

Howell also seeks to rescind the December 20, 1988 agreement. This Court ruled that the agreement was valid and indeed, modified the sublease by deleting the retail use requirement. Accordingly, this Court finds that the cross-complainants cannot rescind the December 20, 1988 agreement.

1. Civil Conspiracy Claims

Civil conspiracy is defined by California courts as a combination of two or more persons to accomplish by concerted action a criminal or unlawful purpose resulting in damage to the plaintiff. Peskin v. Squires, 156 Cal.App.2d 240, 246 (1957) Everyone who enters a conspiracy is by law a party to every action

previously or subsequently done by any of the other conspirators in pursuance of the conspiracy.

In order to prove a civil conspiracy, a plaintiff need not produce evidence showing that the defendants met and actually agreed to undertake the performance of the unlawful act (i.e. interference with JPL's perspective economic relationship with Oshman or interference with JPL's contractual relationship with Liberty under the Master Lease). Black v. Sullivan, 48 Cal.App.3d 557, 567 (1975). Due to the inherent difficulty in proving a conspiracy, the courts have held that a conspiracy may be inferred from the nature of the acts done.

In this summary judgment motion, JPL is entitled to have the court view all evidence presented in the motion in the light most favorable to JPL and all inferences must be drawn in JPL's favor. Summary judgment is improper where reasonable minds could disagree as to a person's motives. Braxton-Secret v. A.H. Robins co., 769 F.2d 528, 532 (9th cir. 1985).

JPL's claim against Oshman for conspiracy is based upon Oshman's alleged participation in the efforts by the Columbia Group to drive down the value of JPL's master leasehold. JPL cites to the following facts:

1. Columbia had no economic interest in acquiring the subleasehold to occupy it as a tenant, nor did it have any economic interest in payment 100 cents on the dollar for Oshman's judgment against JPL, except to use them as leverage to obtain concessions under its Master Lease for which it and its predecessors had not bargained. (The letter dated March 8, 1989, Exhibit 50, from Zarefsky to Columbia openly encourages Columbia to acquire the judgment for use as leverage and indicates that Oshman and Columbia were acting together to put economic and legal pressures upon JPL for their own ends.

2. Mr. Zarefsky was fully aware that Oshmans' actions in entering into this proposed transaction with Columbia would constitute tortious interference and possible conspiracy. This is evidenced by the fact that in that same letter, Mr. Zarefsky requests full indemnity of Oshman by Columbia for Oshman's cooperation, including any liability for punitive damages.

In response to these assertions by Howell, Oshman claims that Howell has still not shown any evidence of an agreement to engage in an unlawful objective. Oshman simply agreed with Liberty to assign its sublease to them, which this Court already found to be a lawful assignment. There was also no obligation on Oshman's part to sell its sublease interest to Howell.

Therefore the state of mind of the parties is not relevant. Oshman did nothing unlawful and summary judgment is appropriate for Oshman on the conspiracy issues.

III. Conclusion

After considering the motion, the opposition papers, the arguments of counsel and all other matters presented to the Court, the Court hereby finds the following issues in the complaint and cross-complaint to be established without substantial controversy:

1. That Oshman did not engage in an unlawful conspiracy with any cross-defendant because the assignment of the lease was valid an Oshman had no written obligation to deal exclusively with the Howell Group. Nor was there any obligation on Columbia's part to purchase Howell's master lease interest;

2. That Cross-complainants cannot rescind the December 20, 1988 agreement;

3. That Oshman did not violate the covenant of good faith and fair dealing; and

4. That Oshman did not breach the sublease.

The Court makes no finding on (1) whether Oshman made false promises or representations, and (2) whether the cross-complainants have suffered any damages.

In light of the above analysis and conclusions, this Court also makes the following findings with regard to Development Partners, Liberty Service Corporation and Resolution Trust Corporation's (in its capacity as receiver of Columbia Saving and Loan Associations) (collectively, the "RTC") Motion for partial summary judgment:

1. By ruling that the assignment was valid, this Court eliminated the causes of action for trespass, ejectment, termination of the sublease, constructive eviction, conspiracy to constructively evict, breach of contract and breach of the covenant of good faith and fair dealing.

2. The RTC did not interfere with any contractual relationship or prospective economic advantage of cross-complainants;

The Court makes no finding on (1) whether the RTC committed waste or conversion as alleged in the Second Amended Cross-Complaint, (2) whether the RTC made any misrepresentations to cross-complainants, (3) whether the demolition may proceed, (4) the rights under the demolition claims, (5) whether the landlord violated the Master Lease parking space requirements, and (6) whether Columbia has any right to remove any tenant improvements.

IT IS SO ORDERED

"s\s Richard A. Gadbois, Jr."
RICHARD A. GADBOIS, Jr.
United States District Judge

DATED: August 16, 1993

D x

APPENDIX E

FILED
MAY -------
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DEVELOPMENT PARTNERS, INC. et al. Plaintiffs, v. JPL PROPERTIES, et al. Defendants.	NO. CV-91-3828 RG (JRx) Memorandum Decision and Order

The above-entitled action came before this Court and was heard on Tuesday, March 22, 1994. After careful consideration of the testimony and exhibits presented at trial, the Court hereby makes the following finds of fact and conclusions of law:

FINDING OF FACT:

1. Columbia Development Partners, Inc., (hereinafter the "Lessor") has provided JPL Properties, Inc., Arthur G. Lawrence, Lorraine Howell and Karl H. Sturckow (hereinafter the "Lessee") with the necessary two and one half years notice of its intent to demolish as required by the Master Lease. (Exhibit 93).

2. Such notice was given on December 1, 1988, and expired on June 1, 1991.

3. Pursuant to Paragraph 33 of the Master Lease, the Lessor is obligated to provide substitute premises to the Lessees. (Exhibit 9).

4. Pursuant to the Sublease if the Lessor exercises its right to demolish the building pursuant to Paragraph 33 of the Master Lease, the Sublessor must offer substitute premises to the sublessee. (Exhibit 12)

5. The Lessor and Sublessee are the same entity.

6. The Sublessee's tender to the Sublessor of the rent for January, 1990, and February, 1990, and any offer to make further payments under the Sublease was conditioned on the Sublessor waiving its objection to the assignment of the Sublease to Columbia Development Partners, Inc., and Liberty Service Corporation. (Exhibit 456).

7. The amount due to the Lessee under the Master Lease as annual security deposit repayments is $60,000 plus interest at a rate of 7% per annum.

8. The amount due to the Lessor as rent under the Master Lease since January , 1990, is $0.

9. The amount due the Sublessor as rent under the Sublease since January, 1990, is $280,330.17 plus interest at a rate of 7% per annum.

10. No issues were raised or evidence presented as to the seventeenth (constructive trust), nineteenth (unjust enrichment), twentieth (promissory estoppel), twenty-first (equitable estoppel) and twenty-second (declaratory relief as to parking issues) claims of the Counterclaim.

11. No issues were raised or evidence presented as to the liability of the Resolution Trust Corporation as Receiver for Columbia Savings and Loan.

CONCLUSIONS OF LAW:

1. The Lessor has provided the Lessee with notice of intent to demolish and said notice has expired; consequently, demolition may proceed at the election of the Lessor.

2. The assignment of the Sublease to Columbia Development Partners, Inc. and Liberty Service Corporation had no effect on the sublessor/sublessee relationship. Vucinich v. Gordon, 51 Cal.App.2d 434, 436 (1942).

3. When the Lessor became the Sublessee, its obligation to pay the portion of the subrent due to it as rent under the Master Lease was thereby extinguished. Id.. Therefore, interest may only incur on the differential between the subrent and the rent.

4. The Sublessee's tender of the rent for January, 1990, and February, 1990, and any further offer to make payments under the Sublease did not stop the running of interest on its obligation because the offer was conditioned on the Sublessor waiving its objection to the assignment of the Sublease to Columbia Development Partners, Inc. and Liberty Service Corporation. Klinger v. Realty World Corp., 196 Cal.App.3d 1549, 1554 (1987).

5. As to the interest due under the Master Lease, obviously, no interest is due if the Lessee is not in default; and as pointed out by Judge Lasarow of the United States Bankruptcy Court, the Lessee is not in default because "more money is owed to the [Lessee] than is owed to the [Lessor]; so it's offsetting."

6. The Lessee is entitled to security deposit repayments with interest.

7. There is no privity of contract between the Sublessee and the Lessor; a sublessee is in privity of contract only with its own sublessor. Marchese v. Standard Realty & Dev. Co., 74 Cal.App.3d 142, 147 (1977). Consequently, the Sublessee has no rights

under the demolition clause of the Master Lease of the Sublease to negotiate directly with the Lessor.

8. Subletting does not "change or enlarge the rights of the Sublessor, who is the Lessee under the [M]aster [L]ease . . ."; Boston Properties v. Pirelli Tire Corp., 34 Cal.App.3d 985, 992 (1982). Therefore, despite the assignment of the Sublease to Columbia Development Partners, Inc. and Liberty Service Corporation, the Lessee is still entitled to all rights and guarantees of the Master Lease.

9. The Lessee is not liable for any additional realty property tax pass throughs.

10. As no issues were raised or evidence presented as to the seventeenth, nineteenth, twentieth, twenty-first and twenty-second claims of the Counterclaim, these claims are deemed abandoned.

11. As no issues were raised or evidence presented as to the liability of the Resolution Trust Corporation as Receiver for Columbia Savings an Loan, this issue is deemed abandoned.

12. The Court in its calculations has excluded unknown contingent liabilities through April 25, 1994.

IT IS SO ORDERED.

"s\s Richard A. Gadbois, Jr."
Richard A. Gadbois, Jr.
United States District Judge

Dated: May 9, 1994

APPENDIX F

FILED
JUL 26 1994
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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Attorneys for Defendants and
Cross-Complainants, JPL PROPERTIES

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DEVELOPMENT PARTNERS, INC., formerly known as WILSHIRE MASTERPIECE, INC., formerly known as WILSHIRE-CANON, INC., formerly known as 338 RODEO CORPORATION), a California corporation; and LIBERTY SERVICE CORPORATION, a California corporation, al. Plaintiffs, v. JPL PROPERTIES, a purported California general partnership; ARTHUR LORRAINE HOWELL, an individual; ARTHUR G. LAWRENCE, an individual; DR. KARL H. STURCKOW, an individual AND DOES 1 through 20, inclusive Defendants. JPL PROPERTIES, a California general partnership; ARTHUR G. LAWRENCE, LORRAINE HOWELL and KARL G.	CASE NO. CV 91-3828-RG (JRx) JUDGMENT Honorable Richard A. Gadbois, Jr., Judge Presiding

STURCKOW,

Cross-
Complainants,

v.

RESOLUTION TRUST CORPORATION AS RECEIVER FOR COLUMBIA SAVINGS & LOAN ASSOCIATION, 338 RODEO CORPORATION, WILSHIRE-CANON, INC., DEVELOPMENT PARTNERS, INC., LIBERTY SERVICE CORPORATION, OSHMAN SPORTING GOODS, CALIFORNIA, SCOTT V. OGILVIE and THOMAS HARRISON,

Cross-
Defendants

This matter came before the Court for trial on March 22, 1994 as to claims then remaining, the Court earlier having adjudicated certain matters by orders filed September 25, 1992 and August 16, 1993, and certain other matters having been resolved by stipulation of the parties and dismissal of certain claims. The court, having determined that certain matters were without substantial controversy and having made its findings of fact and conclusions of law, now renders Judgment as follows:

IT IS ORDERED, ADJUGED AND DECLARED:

1. Cross-complainants JPL Properties, Arthur G. Lawrence, Lorraine Howell and Karl H. Sturckow shall have an recover nothing by their cross-complaint against Oshman Sporting Goods Co California, and the same is dismissed with prejudice.

2. Cross-complainants JPL Properties, Arthur G. Lawrence, Lorraine Howell and Karl H. Sturckow shall have and recover nothing by their cross-complaint against Scott V. Ogilvie, and the same is dismissed with prejudice.

3. Cross-complainants JPL Properties, Arthur G. Lawrence, Lorraine Howell and Karl H. Sturckow shall have and recover nothing by the cross-complaint against Thomas Harrison, and the same is dismissed with prejudice.

4. Because the Court found that the assignment of the sublease from Oshman to Wilshire-Canon, Inc. and Liberty Service Corporation (the "Assignment") was valid, the Cross-Complainants' claims against Cross-defendants Development Partners, Liberty Service and the Resolution Trust Corporation for trespass, ejectment, termination of the Sublease, constructive

eviction, conspiracy to constructively evict, breach of contract and breach of the covenant of good faith and fair dealing are found to be without substantial controversy and are dismissed with prejudice.

5. The Cross-Complainants' claim under their Cross-Complaint for constructive trust, unjust enrichment, promissory estoppel, equitable estoppel, and declaratory relief were abandoned and are dismissed with prejudice.

6. The Cross-Complainants' claim, if any, for liability against the Resolution Trust Corporation was abandoned and is dismissed with prejudice.

7. The December 20, 1988 Agreement between Oshman Sporting Goods Co., California on the one hand and Arthur Lawrence, Lorraine Howell, Karl Sturckow, Horace Jenkins and JPL Properties (the "Lawrence and Howell Group") modified the sublease entered into in 1978 between Karl Sturckow, Lorraine Howell and Horace Jenkins on the one hand and Oshman on the other by deleting the requirement that Oshman use the premises for retail sales.

8. The assignment of the sublease from Oshman to Wilshire-Canon, Inc., and Liberty Service Corporation ("Wilshire-Canon/Liberty Service") was valid.

9. The Lawrence and Howell Group's refusal to consent to the Assignment of the sublease on the grounds of percentage rent alone was unreasonable.

10. Wilshire-Canon/Liberty Service's possession of the premises as of June 2, 1989 and thereafter was lawful.

11. Melissa Holdings Inc., erroneously identified as Development Partners, Inc. and formerly known as Wilshire Masterpiece, formerly known as Wilshire-Canon Inc., formerly known as 338 Rodeo Corporation, the lessor of the building at issue, has provided the Lawrence and Howell Group, the lessees of the building, with the necessary two and one half years notice of intent to demolish the building, and said notice has expired. Consequently demolition may proceed at the election of the Lessor.

12. Pursuant to Paragraph 33 of the Master Lease, Wilshire-Canon/Liberty Service as Lessor are obligated to provide substitute premises of the Lessee.

13. Pursuant to the Sublease, if the Lessor exercises its right to demolish the building pursuant to Paragraph 33 of the Master Lease, the Sublessor must offer substitute premises to the Sublessee.

14. Despite the valid assignment of the sublease, the Cross-Complainants JPL Properties, Lorraine Howell, Arthur G. Lawrence and Karl H. Sturckow, as Lessees retain all their rights and guarantees under the Master Lease.

15. Melissa Holdings Inc. and Liberty Service Corporation, in their capacity as sublessees, have no rights under the demolition clause of the master lease or sublease to negotiate directly with Melissa Holdings, Inc., in its capacity as owner.

16. JPL Properties, Lawrence, Howell and Sturckow, are not liable for any additional real property tax pass-throughs as lessees of the building.

17. As of March 21, 1994, there was due and unpaid from Melissa Holdings Inc. to JPL Properties, Lawrence, Howell and Sturckow, an annual security deposit repayments, $60,000, plus interest from February of each year beginning with 1989 as each of six $10,000 payments came due, at a rate of 7% per annum. Through May 31, 1994 such interest totals $11,876.99, and such interest accrues at the daily rate of $11.50 from May 31, 1994 until the date this judgment is signed.

18. As of March 21, 1994, there was due and unpaid from Melissa Holdings Inc. and Liberty Service Corporation to JPL Properties, Lawrence, Howell and Sturckow, as rent under the Sublease from January 1990, through March 21, 1994, $280,330.17, plus interest on each month's rent on the sublease as it came due, net of rent owed under the master lease, at a rate of 7% per annum. Through May 31, 1994 such interest totals $45,744.04, and such interest accrues at the daily rate of $53.76 from May 31, 1994 until the date this Judgment is signed.

19. Any party asserting a right to recover attorney's fees and/or costs shall file a motion before this Court within 30 days from the entry of Judgment. Costs bills need not be filed with the Clerk. The Court will determine prevailing party status, as necessary, and other issues concerning attorney's fees and costs at the time.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: 7-26, 1994

"s\ Richard A. Gadbois, Jr.
United States District Judge